UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 6 | Number 4 Article 3

6-1-1928

The Expanding Treaty Power

Julian P. Boyd

THE EXPANDING TREATY POWER[1]

JULIAN P. BOYD*

"The Constitution . . . was made for an undefined and expanding future." *Hurtado v. California,* 110 U. S. 516.

The framers of the Constitution, familiar with Blackstone and the idea of the sovereign nature of the treaty power, did not concern themselves with the extent or limitations of the power; they were principally interested in vesting it in the safest possible manner in the new system.[2] On the other hand, the framers were also familiar with Montesquieu and his mistaken conception of the efficacy of the English Constitution, that is, the principle of checks and balances in a threefold division of the powers of government.[3] Two more incompatible ideas could hardly have been placed in a single governmental system. As an inevitable consequence of their incorporation in the Constitution, constitutional theory in the United States has developed some unusual principles in regard to the treaty power.

First of all, though the entire legislative power was conferred upon congress, it was inevitable that the treaty power should encroach upon congressional prerogatives, an inconsistency which was observed by some members of the Federal Convention.[4] Judicial interpretation has necessarily permitted this encroachment by saying

* Member of Department of History, University of Pennsylvania.

[1] For an exhaustive bibliography on the subject of the treaty power in general, with especial reference to the United States, see H. H. B. Meyer, List of References on the Treaty-Making Power (1920), Washington, Government Printing Office, 219 pp.

[2] 1 Chitty's Blackstone, 193; Federalist (Jay), No. 64; *id.* (Hamilton) No. 70; 4 Elliott, Debates, 130, 137, 503-504, 513-514; 1 Farrand, Records, 238, 244, 247, 292; 2 *id.* 132, 145, 155, 169, 183; 3 *id.* Appendices C. D. E. F.; R. H. Lee, Letters of a Federal Farmer, in P. L. Ford, Ed., Pamphlets on the Constitution, 1787-1788 (1888); James Iredell of North Carolina, in his reply to the objections of George Mason, reveals the influence of Blackstone in precise terms: "It seems to result unavoidably from the nature of the thing that when the constitutional right to make treaties is exercised, the treaty so made should be binding upon those who delegated authority for that purpose. If it was not, what foreign power would trust us?" Ford, Ed., *op. cit.* 355-356; cf. also, McMaster and Stone, Pennsylvania and the Federal Constitution (1888), 463, 564; E. S. Corwin, National Supremacy (1913), ch. iv; J. W. Stinson, Treaties Made or Which Shall be Made Under the Authority of the United States (1922), 7 Minn. L. Rev. 113-132; Q. Wright, Treaties and the Constitutional Separation of Powers in the United States (1918), 12 Am. J. Int. L. 64-95; Garner, Introduction to Political Science (1910), 406 ff.

[3] 1 Montesquieu, L'esprit des lois, bk. 11, ch. 6; 2 Butler, Treaty-Making Power of the United States (1902), 425-426.

[4] Wright, 12 Am. J. Int. L. 64, citing 2 Farrand, *op. cit.* 297, 392, 538.

that even the exclusive delegation of a power to congress does not exclude it from being the subject of treaty stipulations.[5] As Calhoun tersely put it in 1840, if the fact that a treaty dealt with a power of congress made it unconstitutional, then the exercise of the treaty power had been "one continual series of habitual and uninterrupted infringements of the Constitution."[6] Nevertheless, arguments are still put forth to support the theory that the treaty power cannot infringe upon the prerogatives of Congress. The debate in the Senate over the League of Nations is the most recent outstanding example.[7] Such arguments called forth the statement by one Senator that "the position that a subject is beyond the treaty power because within the powers granted to Congress is utterly indefensible and need no longer be noticed."[8] Not only do the powers of congress not act as a limit upon the treaty power, but, as will be subsequently pointed out, the congressional prerogatives may be expanded by the exercise of the treaty power. At all events, the inconsistency remains, and at times has been the cause of considerable friction between the executive and legislative departments.

In the second place, although a treaty is binding at international law when duly ratified,[9] the treaty power under the Constitution cannot guarantee that its pledge of the faith of the nation will be fulfilled when an act of congress is necessary to give effect to the treaty. Mr. Chief Justice Taft has clearly put it as follows: "The treaty-making power is the promising power of the government; and when we make a promise . . . the treaty-making power is the government. Congress is the performing power of the government,

[5] *Foster v. Neilson,* 2 Pet. 253 (1829); *Whitney v. Robertson,* 124 U. S. 190 (1888).

[6] 5 Moore, Digest of International Law (1906), 164.

[7] It was argued that the Versailles Treaty was unconstitutional because it invaded the war power, the commerce power, and the power to raise and equip armies. 57 Cong. Rec. 1605, 3741, 3911, 4030, 4312, 4523, 4691, 4699, 4859, 4864; 58 *id.* 955 (1919). Wright concludes that "if in truth the treaty power were doomed to steer between a perpetual Scylla of States' rights and an endless Charybdis of congressional prerogative, the ship of state would soon be shattered upon the rocks of unconstitutionality in its international dealings. . . . In fact, the majority of powers delegated to Congress are eminently appropriate for treaty negotiations, and have been the subject of a large part of the treaties ratified and acted upon in the past" (1913), 12 Am. J. Int. L. 80. But cf. Meier, Über den Abschluss von Staatsverträgen (1874), Leipzig, 163-211, who holds that a treaty cannot invade the prerogatives of congress, otherwise congress might cease to be a law-making body and give way to an oligarchical government under the treaty power. 2 Wharton, *op. cit.* 26-27.

[8] 58 Cong. Rec. 964 (1919).

[9] 1 Kent, Commentaries, 165-166; Vattel, Droit des gens, bk. 4, ch. 2, par. 14; Halleck, International Law, 854; Watson, Constitution, 466.

and therefore, when we come to perform, Congress is the government. . . . If Congress does not perform the promises made by the government . . . then it breaks its promise, that is all."[10] There are some authorities, notably Kent,[11] who hold that every treaty made by the President and Senate is *ipso facto* a part of the supreme law of the land, and if any legislation on the part of congress is needed to support the treaty, it is the duty of congress to supply the need. The Court, however, through Mr. Chief Justice Marshall, has given support to the view that treaties requiring legislation are simply contracts *in futuro* and are not complete till the enactment of such legislation.[12] The question is a political one, of course, and it necessarily must be left to the determination of congress to say whether or not the pledge made in a treaty shall be redeemed by legislative enactment.

One of the most remarkable parts of constitutional law affecting the treaty power, however, is the fact that a law of congress may supersede a prior treaty, and likewise a treaty may supersede a prior act of congress, the last in point of time being the one to prevail.[13] Thus, though the treaty power admittedly extends to objects beyond the legislative power; though the former may act on any proper subject of international negotiation not prohibited by the Constitution, while the latter may act only within the specific grants of power in the Constitution, and therefore the canons of interpretation of the two powers are precisely reversed; though the responsibilities of the former are defined by international law, while those of the latter are defined by constitutional law, treaties and acts of congress are supposed to rest on an equal basis. The idea of such an interpretation of acts and treaties was dismissed by Jay in the following words:[14]

"Treaties are made, not by only one of the contracting parties, but by both; and consequently . . . as the consent of both was essential to their formation at first, so it must ever afterwards be to

[10] In a discussion of the constitutionality of the treaty embodying the League of Nations Covenant (1920), 40 Canad. L. Times 1025-1040. Cf. also, C. E. Hughes, 7 Proc. Acad. Pol. Sci. 14, No. 2; Wright, International Law in its Relation to Constitutional Law (1923), 17 Am. J. Int. L. 234-244.

[11] 1 Kent. Comm. 165, 166, 286 (3rd. ed.).

[12] *Foster v. Neilson*, 2 Pet. 253 (1829); *Turner v. Am. Bapt. Miss. Union*, 5 McLean 344 (1852).

[13] *Foster v. Neilson*, 2 Pet. 253 (1829); *Whitney v. Robertson*, 124 U. S. 190 (1888); Chinese Exclusion Cases, 130 U. S. 581, 600 (1889); *Fong Yue Ting v. U. S.*, 149 U. S. 698, 721 (1893); *Horner v. U. S.*, 143 U. S. 570 (1892); *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 460 (1899); *Sanchez v. U. S.*, 216 U. S. 167 (1910).

[14] Federalist, No. 64.

alter or cancel them. . . . They are just as binding, and just as far beyond the lawful reach of legislative acts now as they will be at any future period, or under any form of government."

Nevertheless, as Mr. Chief Justice Marshall said in *Foster v. Neilson,* "If a treaty operates by its own force and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress." And, as the Court said in a subsequent case, "while good faith may cause Congress to refrain from making any change in such law, if it does so, its enactment becomes law."[15] One writer characterizes this doctrine of constitutional law as follows:[16]

"The idea that a 'treaty may supersede a prior Act of Congress and an Act of Congress may supersede a prior treaty,' that solecism of two powers, both supreme, yet each of them liable to be superseded by the other, that 'absurdity of an *imperium in imperio* as Madison called it, has rightfully no place in our constitutional jurisprudence, no title to respect, in so far as incompatible with those great principles of universal law, of the law of nature and of nations, given a new form of command by the Constitution. The doctrine that all treaties of the United States are subject to legislative abrogation, modification, or repeal, appears to have been unknown at the time of the great debates on the Jay treaty. . . . And the polemics which it called forth leave the mind unimpressed with the entire want of justification for . . . . a construction of the Constitution, which, unless qualified, operates to annihilate the treaty-making power and give the legislative authority almost an absolute control over it."

Still another check, at least in theory, rests upon the treaty power as a result of the tripartite division of the powers of government. This is the fact that the determination of the constitutionality of treaties is, as with acts of congress, a matter for judicial determination by the Supreme Court.[17] Thus, according to constitutional law, no foreign state can be certain that obligations entered into by the President and Senate will be sustained by the other departments of government, for such obligations may be repudiated either by legislative abrogation or judicial veto.

While in theory this division of powers under the Constitution

[15] *Whitney v. Robertson,* 124 U. S. 190 (1888).
[16] J. W. Stinson, The Supreme Court and Treaties (1924), 73 U. of P. L. Rev. 1-18.
[17] *Jones v. Meehan,* 175 U. S. 1 (1899); *Chase v. U. S.,* 222 Fed. 593 (1915).

may appear to be a very formidable limitation upon the treaty power, in actual practice it has not presented very serious difficulties, though it has given rise to misunderstandings and friction between the departments.[18] Both congress and the Court have shown a disposition to uphold the pledges of the United States made by the treaty power. Although in regard to treaties calling for appropriations congress has seemed reluctant to act without making it plain that there was a discretionary right vested in congress in the premises, such appropriations have always been forthcoming.[19] Likewise, congress has never abrogated treaties promiscuously by legislation, those with Indians, Chinese, and the French treaty of 1778 being the chief ones in point.[20] The Supreme Court has shown a very liberal attitude toward the treaty power. No treaty has ever been declared unconstitutional, though serious doubts have arisen as to many of them,[21]

[18] Wright (1918), 12 Am. J. Int. L. 64-95, says: "The principle of the separation of powers imposes no limitation, it appears, upon the treaty-making power. If the subject is appropriate for treaty negotiation, consonant with the purposes of the Constitution, and in violation of none of its specific prohibitions, the treaty, if ratified, is valid, and all other departments of government . . . are bound by their allegiance to the Constitution to perform the acts necessary to give it effect." Cf. also H. W. Morris (1903), 37 Am. L. Rev. 363-379: "A treaty will never be made by this government, or at any rate carried into effect, so as to subvert an act of Congress, until it shall have received, in some manner, the sanction of that body. . . . The courts will never be called on to determine the force and effect of such a treaty upon existing laws; and . . . the danger of a clash between the treaty-making power and the legislative branch of the general government, while always present in theory, is to all intents and purposes nonexistent."

[19] Taft (1920), 40 Canad. L. Times, 1027; in 1881, the House Committee on Foreign Affairs reported that in the case of treaties requiring appropriations, the consent of the House was necessary to the conclusion of such treaties, since "the treaty power does not extend to treaties which affect the revenue or require the appropriation of money to execute them." 46th Cong. 3rd. sess. House Rept. 225; McLean held in *Turner v. Am. Bapt. Miss. Union*, 5 McLean 344 (1852), that the treaty power could not appropriate money. Congress asserted its prerogatives particularly in regard to the Jay Treaty of 1795, Louisiana Purchase Treaty of 1803, and the Alaska Purchase Treaty of 1867; Wright, Control of Foreign Relations (1923), 102. The Senate has shown a disposition to obviate friction in regard to such treaties; thus, in 1902, the Senate Committee on Foreign Affairs recommended that, without reference to the merits of the question, each of the reciprocity treaties then under discussion be amended so that the treaties would not take effect until they had been approved by Congress. 57th. Cong., 2nd. sess., Sen. Doc. 47.

[20] 1 Butler, 401 n, 456; 2 *id.* 25, 91, 93, 147.

[21] Wright, *op. cit.*, 102: "The Senate refused to consent to a commercial treaty with the German States in 1844 because of 'want of constitutional competency.' President Jefferson himself seriously questioned the constitutionality of the Louisiana Purchase Treaty. And authorities have questioned the constitutionality of treaties making certain acts crimes, forbidding privateering, etc.," citing 2 Wharton, Digest, 19; 5 Moore, Digest, 225-228, 324; Crandall, Treaties, Their Making and Enforcement (1904), 165, 189-190, 242; Black, Constitutional Law (1910), 274; Wright (1918), 12 Am. J. Int. L. 68, 73.

and at least one important treaty, that with France in 1803, has operated for a time in direct conflict with a specific article in the Constitution.[22] Moreover, the Court has declared, through Mr. Justice Chase, that it would never set aside a treaty except in a very clear case indeed.[23] The Court has also shown a disposition to permit an interpretation of acts of congress and treaties so as to give effect to both if possible, and has declared that it will not permit an act of congress to supersede a prior treaty unless such was the clear and unmistakable intention of congress.[24] Moreover, the treaty power itself has not unduly antagonized the other departments of government; there has been throughout the nineteenth century, not only in this country, but in England and elsewhere, a tendency, extra-legally or otherwise, toward legislative participation in treaty-making, especially in regard to treaties falling within legislative powers.[25] Article V of the treaty between the United States and Hawaii in 1880 declared that the treaty would not take effect until a law to put it in operation had been passed by congress.[26]

In reality, then, the principle of the separation of powers, though an ever-present limitation in theory, has in the past imposed no very serious limitations on the treaty power. It must be borne in mind, however, that this is not due to the congruity of the treaty power with the principle of division of powers, but rather is an obviation of the difficulties of that impossible system by extra-legal developments dependent entirely upon courtesy, expediency, "constitutional understandings"[27] on the part of and between the various departments,

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For popular opinion as to the constitutionality of the Jay Treaty of 1795, see *The American Remembrancer*, 3 vols. Phila. (1795), and John Thomson, Letters of Curtius, Richmond (1804), 73-74.

[22] Farrand, Constitutional Aspects of the Louisiana Purchase Treaty, 7 Am. Hist. Rev. 494 ff.; Cong. Globe, 11th. Cong., 3rd. sess. 97-127; 482-579; 4 Elliott, Debates, 448-451; Edwards, Congress and the Constitution (1902), 64 Albany L. J. 112-124; Webster, Two Treaties of Paris and the Supreme Court (1901).

[23] *Ware v. Hylton*, 3 Dall. 237 (1796).

[24] *Ropes v. Clinch*, 20 Fed. Cas. No. 12041 (1871); *U. S. v. Forty-Three Gallons Whiskey*, 108 U. S. 496 (1883); *Lem Moon Sing v. U. S.*, 158 U. S. 549 (1895); *Johnson v. Browne*, 206 U. S. 309 (1907).

[25] Chow, Le Controle parlementaire de la politique étrangère en Angleterre, en France, et aux États-Unis (1920), 275; Michon, Les traités internationaux devant les chambres (1901), ch. 1; *supra*, note 19.

[26] 19 Stat. at L. 625.

[27] Wright, *op. cit.*, suggests a system of "constitutional understandings" to avoid the difficulties resulting from the fact that "the organs conducting foreign relations have their responsibilities defined by international law, while their powers are defined by constitutional law;" cf. also, H. C. Black, The Relation of the Executive to Legislation (1919), 165-185.

and their high regard for the sanctity of international contracts. There appears no reason to doubt that conflicts may occur between procedural limitations and international obligations; the fact that no serious ones have developed in the past is obviously no guarantee that such will not occur in the future. The action of congress in regard to the Gentleman's Agreement of 1908[28] leaves little doubt as to what may in a future similar case occur with reference to an obligatory treaty. Some writers have pointed out the desirability of removing by amendment or otherwise such actual and potential conflicts between constitutional powers on the one hand and international responsibilities on the other. It would seem, however, that nothing less than constitutional revision could surround the treaty power with sufficient legal safeguards so that it would be in the governmental system what it necessarily must be in theory: an attribute of sovereignty.

II

Aside from these potential limitations, the greatest obstacle with which the treaty power has had to contend perennially has arisen from the dual nature of the government.[29] There are some writers on constitutional law who hold that the Tenth Amendment, reserving all powers not delegated to the federal government to the states or to the people thereof, operates as a limitation upon the treaty power.[30] Former Ambassador John W. Davis properly described the contro-

[28] Buell, International Relations (1925), 67, 686, 691.

[29] One of the latest articles on this phase of the subject is that of J. L. Jackson, The Tenth Amendment Versus the Treaty-Making Power, 14 Va. L. Rev. 441-468 (1928).

[30] H. St. G. Tucker, Limitations on the Treaty-Making Power under the Constitution of the United States (1915), 141, 427; W. E. Mikell (1908), 57 U. of P. L. Rev. 435 ff. and 528 ff.; F. R. Black, The United States Treaty Power and Limited Government (1926), 11 St. L. L. Rev. 7-17; C. B. Bird, Right of States to Pass Local Laws in Conflict with Treaties with Foreign Powers (1917), 24 Case and Comment 290; J. H. Boyd, Limitations on the Treaty-Making Power (1918), 86 Cent. L. J. 172, 188; the last named takes an extremely unwarranted view of the treaty power: "To hold that the treaty-making power is vested with the authority to repeal the California Land Tenue Acts is to deny the sovereign authority of the state the right . . . to regulate matters of strictly local, social, moral, and economic concern. Should our Supreme Court sustain such a treaty, it would make precisely the same blunders it made in the Dred Scott decision;" Shackleford Miller, The Treaty-Making Power (1907), 41 Am. L. Rev. 527-549; D. R. Williams, Is Congress Empowered to Alienate the Sovereignty of the United States? (1925), 12 Va. L. Rev. 1-33; see 12 *id.* 607-631 for an answer to this article.

The above writers are contemporary; for older authorities of the same school, such as Calhoun, Taney, John Randolph Tucker, St. George Tucker, see 2 Butler, *op. cit.* 31-32, 351-352.

versy as "a fierce battle among the pundits,"[31] for the matter can hardly be regarded any longer as an open question in constitutional law. It is necessary, however, to point out certain historical aspects of the question.

Those writers who support a limited treaty power with reference to the reserved powers of the states rely for judicial authority upon a series of *obiter dicta* handed down by the Supreme Court in the period preceding the Civil War.[32] At this time the Supreme Court, as well as the political organs of the government, was dominated by men from the South, where doctrinaires of Calhoun's theory of state sovereignty were most numerous.[33] This preponderance of opinion at the South in regard to state sovereignty was reflected in the decisions of the Court. No more effective indictment of the tendency can be found than that contained in a private letter written by Mr. Justice Story:[34]

"Although my personal position and intercourse with my brethren on the bench has always been pleasant, yet I have long been convinced that the doctrines and opinions of the 'Old Court' were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former times received the support of the whole court, no longer maintain their ascendency. I am the last member now living of the old Court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced."

It is clear, then, that period in which these *dicta* were uttered must be taken into account when they are cited as authoritative judicial opinion for a limited treaty power. These *obiter* opinions have been discredited by subsequent decisions,[35] and one writer predicts their frank disavowal by the Court sooner or later.[36] Another writer credits them with little more than the legal and historical validity of a bill of sale for a Negro slave.[37]

[31] 6 A. B. A. Jour. 1 (1920).

[32] *Holmes v. Jennison,* 14 Pet. 540 (1840); License Cases, 5 How. 504 (1847); Passenger Cases, 7 How. 283 (1849). These cases are fully discussed in Burr, The Treaty-Making Power of the United States (1912), 356-398); supplementing them were a number of cases involving Indian treaties: *Worcester v. Georgia,* 6 Pet. 515 (1832); *U. S. v. Bailey,* 1 McLean (U. S. C. C.) 231 (1834); *U. S. v. Cisna,* id. 254 (1835).

[33] W. E. Dodd, The Cotton Kingdom (1921), 47-54; Burr, *op. cit.* 396-398.

[34] Burr, *op. cit.* 397, citing 2 Life and Letters of Joseph Story, 527.

[35] E. S. Corwin, The Doctrine of Judicial Review and Other Essays, 169.

[36] 1 Willoughby, Constitution, 449, 503.

[37] Burr, *op. cit.* 397.

It is, however, a firmly established principle of law, and has been since *Ware v. Hylton,* with the exception possibly of the period just mentioned, that none of the reserved powers of the states acts as a limitation upon a valid exercise of the treaty power. No subject could be more exclusively under the control of the states than the matter of holding and inheriting lands. Yet treaties invading this right,[38] as well as treaties in conflict with state laws against Asiatics,[39] state laws establishing discriminatory inheritance taxes,[40] and treaties allowing foreign consuls to act as administrators,[41] have uniformly been supported as against the supposed reserved powers of the states. As Professor Corwin has said: "No single item of this sacrosanct group of State prerogatives has ever been vindicated as against the treaty-power in authoritative judicial decision."[42]

There are respects, however, in which "the Federal Government may . . . find itself incapable of maintaining the integrity of a compact regularly entered into with some foreign power for the benefit of the citizens or subjects of that power residing in the United States."[43] The Mafia riots in New Orleans in 1891 are in point.[44] In this instance the national government found itself impotent to compel the State of Louisiana to protect the subjects of the Italian government in rights guaranteed them by a treaty[45] entered into by Italy and the United States concerning their persons and property. As a result, the national government, supposedly vested with sov-

[38] *People v. Gerke,* 5 Cal. 381, 384 (1855); *Yeaker's Heirs v. Yeaker's Heirs,* 4 Metc. Ky. 33 (1862); *Hauenstein v. Lynham,* 100 U. S. 483 (1879); *Geofroy v. Riggs,* 133 U. S. 258 (1890); *Bahnaud v. Bize,* 105 Fed. 485 (1901); *Dockstader v. Roe,* 4 Penn. (Del.) 398 (1903); *Butschkowski v. Brecko,* 94 Neb. 532 (1913).

[39] *In re* Ah Fong, 3 Sawy. 144 (1874); *Baker v. Portland,* 5 Sawy. 566 (1879); *in re* Parrott, 6 Sawy. 349 (1880); *Chapman v. Toy Long,* 4 Sawy. 28 (1876); *in re* Ah Chong, 6 Sawy. 451 (1880); *in re* Lee Sing, 43 Fed. 359 (1890); *in re* Quong Woo, 13 Fed. 229 (1882); cf. also, *Gandolfo v. Hartman,* 49 Fed. 181 (1892).

[40] *Brown v. Peterson,* 170 N. W. (Iowa), 444 (1919); Rixner's Succession, 48 La. Ann. 552 (1896); *Trott v. State,* 171 N. W. (N. D.) 827 (1919); *in re* Stixrud's Estate, 58 Wash. 339 (1910); *Ex parte* Heikich Terue, 180 Cal. 20 (1921).

[41] Succession of Rabasse, 47 La. Ann. 1452 (1895); Wyman, Petitioner, 191 Mass. 276 (1906); *Hamilton v. Erie R. Co.,* 213 N. Y. 343 (1916); *Carpaiagiani v. Hall,* 172 Ala. 287 (1911); *Chryssikos v. Demarco,* 134 Md. 533 (1919).

[42] E. S. Corwin, National Supremacy, 124.

[43] A. K. Kuhn, The Treaty-Making Power and the Reserved Sovereignty of the States (1907), 7 Colum. L. Rev. 172-185.

[44] Kuhn, *id.* 172-176.

[45] 17 U. S. Stat. at L. 49-50.

ereign powers of treaty, drew forth this humiliating but courteous reply from the Italian Minister, Marquis Rudini:[46]

"We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government. . . . We have affirmed and again affirm our right. Let the Federal Government reflect upon its side, if it is expedient to leave to the mercy of each State of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

As Professor Corwin has succinctly put it: "The sum and substance of the matter is this: the United States cannot at one and the same moment utilize its powers of negotiation to secure valuable rights for citizens abroad, and plead incapacity to effect specific performance of its reciprocal engagements at home. It cannot have its cake and eat it too."[47]

III

Two decades ago when the Japanese question in California brought the attention of the nation to the nature of the treaty power, Secretary of State Root made this very significant statement:[48]

"Every treaty made under the authority of the United States is made by the national government as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that under pretense of exercising the treaty-making power, the President and Senate might attempt to

[46] Kuhn, *id.* 176. This case has a recent parallel, but with reference to congressional legislation, rather than states' rights. A Spanish declarant held for the evasion of the Selective Draft Act of 1917 claimed exemption under the treaty of 1903 between the United States and Spain. The courts, according to correct constitutional theory, were obliged to hold the statute valid. *Ex parte* Larrucea, 249 Fed. 981 (1918). The President, however, recognized the binding obligation of the treaty by ordering the release of the Spaniard. 28 Yale L. J. 83 (1918); 29 *id.* 445 (1919).

[47] National Supremacy, 66. The *Montijo* case is in point. In 1871 when this vessel was seized by revolutionists in the State of Panama, then under the jurisdiction of Colombia, the United States in prosecuting the claim contended that Colombia could not evade responsibility under the treaty for the failure of Panama to compensate the owners of the ship. In fact, the arbitrators held that Colombia was responsible. 2 Moore, International Arbitrations, 1439-1442. In this connection it is worth while to note Mr. Chief Justice Taft's statement on the abrogation of a treaty by congressional action: "A treaty may repeal a statute, and a statute may repeal a treaty. . . . In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it, and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect." Arbitration between H. M. the King, etc., and H. E. the Pres. of the Republic of Costa Rica (1922), Washington, 26.

[48] 1 Am. J. Int. L. 278 (1908).

make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question."

The question at once arises, what is a real and valid exercise of the treaty power? What would constitute an unreal and an invalid exercise of it?

Professor Wright makes a threefold division of opinion in regard to these questions, as follows:[49] "(1) The treaty-making power is entirely unlimited; (2) the treaty-making power is subject to constitutional limitations, but the observance of these limitations is entrusted to the treaty power itself, the Senate being especially charged with this function; (3) the treaty-making power is subject to constitutional limitations and a treaty in conflict with the constitution is void, and may be so declared by the courts in the same manner as a statute." He then points out the fact that the great bulk of authority seems to be marshalled in favor of the third view, but actual practice seems to lend support to the second. This classification, however, is not so happy as one could wish for. In the first place, hardly anyone would contend for an absolute and unlimited power of treaty;[50] Blackstone himself, realizing as he did the high nature of public faith involved in treaties, did not assert such a power, although he is generally credited with upholding an unlimited doctrine.[51] Moreover, though actual practice does, especially of late, tend to give credence to the second view, the third view is by no means a uniform one; the adherents of a limited treaty power are capable of classification in groups quite as distinct as, for instance, the first and third views. Under the third view must be placed those who support the extreme

[49] Constitutionality of Treaties (1919), 13 Am. J. Int. I. 242 ff.

[50] Butler may be regarded as one of the most liberal of the broad constructionists; yet he is careful to make clear the point that the treaty power is limited. 2 *op. cit.* 350-402.

[51] Immediately after the famous statement in the *Commentaries,* in which Blackstone points out that any treaty entered into by the sovereign is binding upon the state and no other power in the state can legally delay, resist, or annul its operation, he adds these words: "Lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation." Chitty's Blackstone, 193; Maitland, Constitutional History of England (1920), 425-426; S. T. Spear, Congress and the Treaty Power (1880), 22 Albany L. J. 126-129.

states' rights view, such as Tucker; those who are inclined toward what might be called a modified states' rights view, such as Corwin; and those who hold that the treaty power is limited only by the specific prohibitions in the Constitution and by the consideration that the treaty must be a proper subject for international negotiation such as Butler and Sutherland. The final group, of course, is supported by the much-quoted dictum of Mr. Justice Field in *Geofroy v. Riggs*:[52]

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."

This opinion of the Court recognizes, as do most authoritative writers on the subject, that the treaty power rests in grant and must be exercised in accordance with the terms of the Constitution. Even those who uphold the broadest interpretation of the treaty power do not support the contention that it is an inherently sovereign entity. It is claimed, however, that, to use McKechnie's distinction, the political sovereign has clothed the legal sovereign with the attributes of sovereignty.[53] If the treaty power were not, as Root suggested, the "direct and sole representative" of every citizen of the United States, then other nations could not attach any validity to our international treaty obligations; the essential truth of this elementary fact has been pointed out by Puffendorf,[54] Vattel,[55] Burlamaqui,[56]

[52] 133 U. S. 258 (1890).
[53] McKechnie, The State and the Individual, 131.
[54] Law of Nations, bk. 8, ch. 9, par. 6.
[55] Law of Nations, bk. 2, ch. 12, par. 163: "There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises." Jay, Federalist, No. 64, said: "It would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it." Cf. Iredell's reply to Mason, *supra*, note 2.
[56] 1 Butler, *op. cit.* 348-349, note.

Martens,[57] Blackstone,[58] and others. Such authorities, moreover, have held that it is the duty of states to enforce their international contracts;[59] it is encouraging to note that in the recent European constitutions, that of Germany being one, "the generally recognized rules of international law form an integral part of national law and are binding as such."[60]

The view of the treaty power as a function of government clothed with the attributes of sovereignty is a conclusion reached by Mr. Butler:[61]

"The Federal Government not only possesses . . . powers which have been delegated to it by the people . . . but also . . . certain other powers as inherent attributes of the sovereignty with which it is clothed, in the same manner as all other fully sovereign states possess and exercise such powers; one of the most notable instances is the treaty power. . . . The exercise thereof is controlled not only by constitutional limitations, but also by the general rules of law applicable to all sovereign powers and to their exercise of this prerogative. It extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world. . . . The power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiations between sovereign states, is practically unlimited."

Although the treaty power is a power in grant, and must be used in accordance with the terms fixed in the grant, it must not be thought that such principles are rigid and immutable, applicable only to such conditions and theories as existed in 1787. As Mr. Chief Justice Marshall said in *McCulloch v. Maryland*,[62] the Constitution was

[57] Le droit des gens, 1, 2, ch. 2, par. 54.

[58] *Supra*, note 2.

[59] Wright, The Constitutionality of Treaties (1919), 13 Am. J. Int. L. 242 ff., citing 2 Suarez, Tractatus de Legibus ac Deo Legislatore (1612), c. 19, sec. 9; Grotius, De Jure Belli ac Pacis (1625); 1 Prolegomena c. 5, sec. 8; 2 *id.* c. 20, sec. 40, par. 4; c. 25, sec. 6; Wolff, Jus Naturae et Jus Gentium (1740); sec. 1090; Vattel, Le droit des gens, 1, 2, c. 5, par. 70; Kaltenborn, Zeits, fur die gesamte Staatswissenschaft (1861), 27, 86.

Root makes the following statement on the subject: "If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation" (1916), 10 Am. J. Int. L. 9.

[60] Wright (1919), 13 Am. J. Int. L. 247, citing McBain and Rogers, Constitutions, 177, 257; Scott, Cases on International Law (1922), 18.

[61] 1 Butler, *op. cit.* 4.

[62] 4 Wheat. 316 (1819).

intended to meet the varying crises in human affairs and was adopted for all time. This adaptability to changing conditions is nowhere shown so strikingly as in the changing and expanding nature of the treaty power. For if the treaty power is to all practical purposes limited only to subjects which might properly be matters for international negotiations, it is obvious that the limits of the power are coeval and coterminous with the increasing and expanding nature of the relations between nations. It now remains to point out one of the most recent developments of the treaty power, and to discuss some possibilities in the use of the power which it suggests, namely the case of *Missouri v. Holland*[63] and its importance.

IV

The point settled in *Missouri v. Holland* is, in reality, only of historical significance. Two decades before the decision was handed down Mr. Butler gave this correct view of the question involved: "The power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty making power, and. . . Acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions."[64] This, in essence, was the point settled in *Missouri v. Holland.*

If, therefore, an otherwise unconstitutional Act of Congress is held to be constitutional when passed to give effect to a treaty, does this operate to extend the legislative powers of Congress? If so, is it a dangerous tendency which may be, as it is by some,[65] characterized as government under the treaty power? Moreover, does such a principle effectively wipe out the distinction of the dual nature of our government? In addition to undertaking a consideration of these questions, it is the purpose of this paper to inquire specifically whether or not as a result of this decision congress may enact labor legislation, such as child labor laws; in pursuance to a treaty, whereas, without such a treaty, no such authority exists in the legislative power.

[63] 252 U. S. 416 (1920).
[64] 1 Butler, *op. cit.*, 4.
[65] Meier, *op. cit.* 163-211; L. L. Thompson, State Sovereignty and the Treaty-Making Power (1922), 11 Cal. L. Rev. 242-258.

In discussing these questions, it is necessary to give some attention to the statutes and the treaty which gave rise to the case of *Missouri v. Holland,* especially since recent writers have omitted to take notice of the debates in congress concerning the subject.[66] In 1912 the Senate passed a bill regulating the killing of certain migratory birds, but the bill failed in the House on account of the objections as to its constitutionality.[67] At the same time, Senator McLean, chief sponsor of the bill in the Senate, admitted his doubts as to the constitutionality of the bill to be so strong that he introduced an amendment to the Constitution for the same purpose.[68] At the next session of congress, a similar bill again passed the Senate almost unanimously; there was no discussion as to its constitutionality.[69] In the House, as before, there was a prolonged debate over the constitutionality of the measure.[70] Representative Mondell gave perhaps the most strenuous defense of state rights in the premise:[71]

"This, in my opinion, is the most revolutionary, the most far-reaching legislation, in its possible and probable effect on our system of government, that has been presented to Congress in the sixteen years during which I have been a member of this body. If this bill should become a law, no man who voted for it would ever be justified in raising his voice . . . against any extension, no matter how extreme, of the police authority and control of the federal government."

In spite of this opposition, however, the measure passed the House, and on March 4, 1913, became a law.[72] Immediately after its passage, and before the law had had a chance to be tested in the courts, Senator McLean introduced a resolution, similar to one which Senator Root had introduced the previous session, calling for a treaty on the subject of migratory birds.[73] This resolution passed the Senate without debate.[74] At a later session, Senator Robinson referred to Senator McLean's doubts as to the constitutionality of the original bill, and charged that the introduction of resolutions for

[66] Note, 30 W. Va. L. Q. 105-109 (1923); note, 8 Cal. L. Rev. 177 (1919); note, 33 Harv. L. Rev. 281-287 (1919); note, 29 Yale L. J. 445 (1919); Corwin, note, 15 Am. Pol. Sci. Rev. 54 (1921).
[67] 47 Cong. Rec. 2564 (1912); 48 Cong. Rec. 5167, 5248, 5385, 6198, 8547-8549, 9678 (1912); Sen. Rept. 675.
[68] 47 Cong. Rec. 2564 (1912).
[69] 49 Cong. Rec. 1485, 1871, 1929, 2725, 2399 (1913).
[70] 49 Cong. Rec. 2725, 4330-4331 (1913).
[71] 49 Cong. Rec. 4330, 4337-4338 (1913).
[72] 37 U. S. Stat. at L. 847 (1913).
[73] 49 Cong. Rec. 1494 (1913); Sen. Rep. 161.
[74] 50 Cong. Rec. 57, 2339-2340 (1913).

the enactment of a treaty on the subject was for the sole purpose of giving congress power to pass a law which otherwise it was doubtful that it possessed. He quoted Senator Root as saying in regard to the treaty power: "I think, sir, that that may furnish a pathway along which we can proceed to some practical relief in regard to the very urgent and pressing evil. . . . It may be that under the treaty-making power a situation can be created in which the Government of the United States will have constitutional authority to deal with this subject."[75] It cannot be said, however, that all Senators took such a view of the treaty power. Senators Borah and Reed, for instance, were of the opinion that the treaty power could not extend to subjects which were not included in the powers of congress; that, at least, was the essence of their argument. "If we cannot ourselves deal with this subject," said Borah, "it seems to me inconceivable that we can get any aid by going to a foreign government and making a treaty with that government."[76]

In the meantime, the Act of 1913 was declared unconstitutional by one state court and two federal courts.[77] The Department of State acted upon the resolution of the Senate in regard to a treaty,[78] and on August 26, 1916, a treaty with Great Britain covering the subject of migratory birds was ratified by the Senate in executive session in less than thirty minutes.[79] In 1918, in the debates in congress on the bill to give effect to the treaty, Senator Reed again strenuously opposed the measure on account of his objections to its constitutionality, in spite of the treaty. "The advocates of this bill," he said, "seem to be obsessed with the idea that Congress can do by treaty an act in violation of the Constitution of the United States which it cannot do by statute, a remarkable kind of logic which I think can only be indulged in by a man who has become thoroughly obsessed with this bird legislation."[80]

There was also considerable opposition to the constitutionality of the measure in the House.[81] The constitutional arguments of Representative Stedman, however, effectively silenced such opposition. Taking a broad viewpoint of the treaty power, he said: "The

[75] 51 Cong. Rec. 8349, 8354 (1914).
[76] 51 Cong. Rec. 8354 (1914).
[77] *U. S. v. Shauver,* 214 Fed. 154 (1914); *U. S. v. McCullagh,* 221 Fed. 288 (1915).
[78] 64th. Cong., 2nd. sess., House Rept. 1430.
[79] 53 Cong. Rec. 13348; 39 U. S. Stat. at L. 1702 (1916).
[80] 55 Cong. Rec. 5379, 5547-48 (1918).
[81] 56 Cong. Rec. 7361, 7363, 7365, 7369, 7446, 7462 (1918).

treaty is valid. It violates no fundamental principle of our government. It was negotiated and concluded by the authorities having undisputed power to do so. . . . The power to make treaties extends to all proper subjects of negotiation between our government and that of other nations. . . . There is a marked distinction between the right of Congress to legislate for the protection of birds . . . in the absence of any treaty with another nation with reference to the same subject and affecting the interests of that other nation, and the right to so legislate after a treaty is made to carry it into effect."[82] The charge was also made in the House that the real purpose for the enactment of the treaty was to make a bill constitutional which otherwise would be unconstitutional.[83] The measure, however, became law in spite of the arguments with reference to its constitutionality.[84]

Missouri v. Holland was a bill in equity brought by the State of Missouri to prevent a game warden of the United States from enforcing the Act. The counsel for the appellant based their argument on the ground that the statute was an unconstitutional interference with the rights reserved to the states by the Tenth Amendment and that the efforts of the federal government to enforce the Act and the treaty contravened the will of the state as manifested in its statutes.[85] This argument was supplemented by the proposition that the control of migratory birds within their respective limits was a power reserved to the states,[86] being, as it was alleged, a necessary incident of the police power of the states and an attribute of their sovereignty.[87] The counsel affirmed furthermore that if the control of this attribute of sovereignty of the states were assumed by the treaty power, when the national government could not, admittedly, assume such control by reason of its other delegated powers, then "the Tenth Amendment with its powers 'reserved' to the States respectively or to the people, is a delusion, and they are States in name only, and our government a very different government from that

[82] 56 Cong. Rec. 7361 (1918).
[83] 56 Cong. Rec. 7365 (1918).
[84] 40 Stat. at L. 755 (1918).
[85] 252 U. S. 422 (1920), citing 4 Hamilton, Works, 342; Cooley (1893), Forum, 397; Von Holst, Const. Law of the United States, 202; Duer, Lectures on Const. Jurisp. of the United States, 2nd. ed. 228; Tucker, *op. cit.* 128, 129, 135-136, 139; Miller, 51 Am. L. Rev. 530 (1907).
[86] *Geer v. Connecticut,* 161 U. S. 523-530 (1895); *Ward v. Race Horse,* 163 U. S. 504 (1896).
[87] *State v. Heger,* 194 Mo. 707, 93 S. W. 252 (1906).

presupposed and intended by the people who ratified the Constitution."[88] To further support this argument the counsel cited judicial authority to establish the point that treaties and acts of Congress rest on a parity, a point which counsel for the appellee readily admitted.[89]

The Court, through Mr. Justice Holmes, met this argument by going at once to the question of whether or not the treaty and the subsequent Act were voidable as coming in contact with some "invisible radiation from the general terms of the Tenth Amendment."[90] The Court passed over the question of whether or not the federal courts had been correct in declaring the Act of 1913 unconstitutional, and proceeded to draw a distinction between acts of Congress passed in pursuance of the Constitution and treaties made under the authority of the United States. The pertinent part of the decision is worth quoting:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. . . . It is obvious that there may be matters of the sharpest exigency for the national well-being that an Act of Congress could not deal with but that a treaty followed by such an Act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[91]

[88] Citing the Passenger Cases, 7 How. 474 (1849).

[89] Cherokee Tobacco Case, 11 Wall. 616 (1870); Fong Yue Ting, 149 U. S. 698 (1893).

[90] Mr. Justice Holmes cited the following cases to establish the point that treaties otherwise valid may overrule the reserved powers of the States: *Baldwin v. Franks,* 120 U. S. 678 (1887); *Hopkirk v. Bell,* 3 Cranch 454 (1806); *Ware v. Hylton,* 3 Dall. 199 (1796); *Chirac v. Chirac,* 2 Wheat. 259 (1817); *Hauenstein v. Lynham,* 100 U. S. 483 (1879); *Geofroy v. Riggs,* 133 U. S. 258 (1890); *Blythe v. Hinckley,* 180 U. S. 33 (1901); Wildenhus' Case, 120 U. S. 1 (1887).

[91] The immediate motive of the framers of the Constitution in making a distinction between acts of congress and treaties by declaring that one should be passed "pursuant to the Constitution" while the other should be "made under the authority of the United States apparently was their desire to give effect to treaties entered into before 1787, notably the Treaty of Peace of 1783, which obviously could not be made "pursuant to the Constitution." 2 Farrand, *op. cit.* 417; Corwin, National Supremacy, 64. In thus giving a new meaning to this distinction, Mr. Justice Holmes added: "When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they called into life a being the development of which could not

Mr. Justice Holmes concluded that there existed a national exigency of such importance that the treaty remedying the situation not only could, but, "considering the case in the light of our whole experience," should be upheld:

"Here is a national interest of very nearly the first magnitude involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the states. The reliance is in vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld."

This decision has been received on the one hand as the mere settlement of a point in constitutional law of only historical importance, and most authoritative writers find it to be based upon correct principle.[92] On the other hand the extreme advocates of states' rights have seen in it a destruction and obliteration of the dual form of government established under the Constitution, and have feared that it was not only a further step toward centralization of the federal government, but an indefinite expansion of the legislative powers of Congress.[93] One writer of this school comments on the decision as follows:[94]

"The substantial effect of the Holland case is to declare the treaty-making power to be unlimited. . . . It is a fair statement that under the decision of the court in the migratory bird case, the sovereignty of the State is completely subordinate to the treaty-making power and the legislative power of Congress in the exercise of the

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have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism. . . . The Case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."

[92] Corwin, 15 Am. Pol. Sci. Rev. 54 (1920); J. P. Chamberlain, The Migratory Bird Treaty Decision and Its Relation to Labor Treaties (1920), 10 Am. Lab. Leg. Rev. 133-135; C. K. Burdick, The Treaty Making Power and the Control of Foreign Relations (1921), 7 Corn. L. Rev. 35-39; note (1919), 29 Yale L. J. 445; note (1919), 33 Harv. L. Rev. 281-287; note (1919), 8 Cal. L. Rev. 177.

[93] L. L. Thompson, State Sovereignty and the Treaty-Making Power (1922), 11 Cal. L. Rev. 242-258; note (1920), 6 Va. L. Reg. (N. S.) 214: "What need of the 10th Amendment, or for all the checks and balances our fathers so carefully placed in the Constitution to prevent this very assumption of 'hidden power'?"

[94] Thompson, 11 Cal. L. Rev. 250 (1922).

enforcement of a treaty. . . . The practical effect of this decision is this: we have in the Republic a third legislative branch of the Government, composed of the President and some foreign nation, with the veto power vested in the Senate, which is authorized to enact local police regulations governing the affairs of our citizens. In this day of internationalism the possibilities inherent in such a system are not lightly to be disregarded."

On the other hand the supporters of a broad interpretation of the treaty power are inclined to take a constructive view of the decision:[95]

"Were it true that the United States could not enter into treaties affecting matters understood to be generally reserved to the States, since the States have by the Constitution surrendered to the United States the entire treaty-making power, the result would be an intolerable restriction upon the power of a sovereign nation. . . . Such a crippling of the sovereignty of the national government could never be presumed to have been intended by the framers of the Constitution. Whether considered in the light of past decisions, or in the light of building up a practical and serviceable framework of government, therefore, there would seem to be no room to doubt the correctness of the three latest decisions upon the scope of the treaty-making power in the United States."

There can be little doubt that the treaty and the pursuant Act were upheld by means of firmly-established constitutional principles; the basis upon which Mr. Justice Holmes rested his decision is unassailable.[96] Moreover, it is true, as Professor Corwin says, that "*Missouri v. Holland* makes more important than ever the political check which resides in the Senate on the treaty-making power."[97] The effective result in theory, then, is that the legislative power is

[95] 33 Harv. L. Rev. 286 (1919); this article, of course, was written before *Missouri v. Holland,* but was concerned with the decisions which preceded it in the lower courts: *U. S. v. Shauver,* 214 Fed. Rep. 154; *U. S. v. McCullagh,* 221 Fed. Rep. 288.

[96] The matter was certainly a proper subject for international negotiation; treaties of a like nature between nations are not unusual. 2 J. Comp. Legis. (3rd. ser.) 24 (1920). Moreover, there was a precedent for the decision in the opinion of the Attorney General in 1898 in regard to control of the fish in the boundary waters between the United States and Canada; it was held that, though the federal government could not regulate fisheries within the territorial jurisdiction of the states, the government could control fisheries in the boundary waters, for there the matter constituted a fit subject for international agreement, and the United States could conclude a treaty on the subject, though the fish were sometimes within the territorial jurisdiction of the states. 22 Op. Att'y.-Gen. 214 (1898). It is significant to note that Senator Borah, in the debate over the law for carrying the Migratory Bird Treaty into effect, held that this was not a parallel case. 57 Cong. Rec. 8354 (1918).

[97] 15 Am. Pol. Sci. Rev. 54 (1921).

coextensive with the treaty power, and the treaty power may be regarded as having attained what the framers of the Constitution undoubtedly intended that it should have, the attributes of sovereignty.

In thus arriving at what we may call its political maturity, the treaty power has gone through a century and a half of expansion in the field of subjects proper for international negotiation. In advancing from the eighteenth-century status consisting largely of definitive guarantees concerning such political matters as alliances, war, neutrality, fixation of boundaries, recognition of states, and the like, to the present status consisting of not merely political contracts but even "codes of law or administrative regulations providing for international coöperation in a smaller or wider circle,"[98] the treaty power has encountered at each successive step a perennial and determined opposition on the part of the doctrinaires of the states' rights school.[99] At one time, even commercial treaties were opposed because of their alleged unconstitutionality;[100] Webster himself advised against them.[101] Arbitration treaties have likewise been opposed for a time.[102] Practically every treaty concerned with matters falling within the control of the states by the Tenth Amendment has met the charge of unconstitutionality.[103] In every case the treaty power has, necessarily, been sustained by the Supreme Court.[104] For there would be no sovereignty worthy of the name in the national government if the United States could only plead constitutional incompetency when approached by foreign nations in regard

[98] Wright, The Constitutionality of Treaties (1919), 13 Am. J. Int. L. 242.

[99] Hayden, States' Rights Doctrine and the Treaty-Making Power (1917), 22 Am. Hist. Rev. 566-585.

[100] John Randolph Tucker's states' rights views of the treaty power found official expression in the report of the Judiciary Committee of the House in 1885 on this subject, in the form of the following resolution: "The President, by and with the advice and consent of the Senate, can not negotiate treaties with foreign governments by which the duties levied by Congress can be changed or abrogated, and such treaties to be operative as law must have the sanction of an Act of Congress." 48th. Cong., 2 sess., House Rep. 2680; cf. also the speech of Senator W. M. Evarts, doubting the validity of reciprocity treaties, 21 Cong. Rec. 9882-9883 (1890); Senator J. S. Morrill to the same effect, 16 Cong. Rec. 506-513 (1885); also, 46th. Cong. 2nd. sess. House Rept. 1127, pts. 1 and 2. For an argument tending to uphold the constitutionality of commercial treaties, see S. G. Croswell, The Treaty-Making Power Under the Constitution (1886), 20 Am. L. Rev. 513-527.

[101] 2 Curtis, Life of Daniel Webster, 173-175.

[102] Olney, General Arbitration Treaties (1912), 6 Am. J. Int. L. 595-600; Lyman Abbott, The Power of the Government to Make a General Arbitration Treaty, Lake Mohonk Conf. on Int. Arb. 11th Rept. 1905, 68-71; Taylor, The Growth of Hague Ideals (1906), 40 Am. L. Rev. 1-8.

[103] *Supra,* note 30.

[104] *Supra,* note 21.

to entering upon contracts falling properly within the field of international intercourse and perhaps even affecting the vital interests of the nation.

V

In commenting on the case of *Missouri v. Holland,* one writer said:[105]

"It is within the power of the Federal Government by treaty to remove from State control any matter which may become the subject of negotiation with a foreign government. With the continued drawing together of the world by increased facilities for travel and communication, the subjects of common interest which require international regulation will continue to grow in extent and variety. Uniformity of legislation by withdrawal from State legislative control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary federal treaty power."

Since 1900 there have grown up new types of treaties as a result of the growth and multiplication of international relations, and, as before, the competency of the treaty power in regard to them has been questioned. One of the latest, and apparently by now one of the most important subjects of negotiation has been the problem of correcting and remedying the grievances of labor by international coöperation. In consequence, there arises this important question: If the treaty power of the United States extends to matters even exclusively under the control of the states, if proper subjects for international negotiation, can it enter into agreements with other nations, being supported by appropriate legislation on the part of Congress, concerning such important labor problems as, for instance, child labor, night work for women, workmen's compensation, the eight hour day, and other like measures?[106] To answer this question

[105] 29 Yale L. J. 445 (1919).

[106] This question has been raised, and disposed of almost uniformly in the affirmative, by the following articles: J. P. Chamberlain, The Power of the United States Under the Constitution to Enter into Labor Treaties (1919), 9 Am. Lab. Leg. Rev. 330-338; also, 8 Proc. Acad. Pol. Sci. No. 3 (1919); Chamberlain, the Migratory Bird Treaty Decision and Its Relation to Labor Treaties (1920), 10 Am. Lab. Leg. Rev. 133-135; note, Labor Legislation Under the Treaty Power (1922), 22 Mich. L. Rev. 457-463; Parkinson, Constitutionality of Treaty Provisions Affecting Labor (1919), 9 Am. Lab. Leg. Rev. 21-32; cf. also, 15 *id.* 69-72, 174-175, 377-378 (1925); Feis, The Eight Hour Day by International Action (1924), 39 Pol. Sci. Q. 373-413; Miller, Some Results of the Labor Clauses of the Treaty of Versailles (1921), 6 Corn. L. Q. 133-153. But cf. Senator Hardwick's speech in the debate over the Versailles Treaty, 57 Cong. Rec. 4699 (1919).

in the light of *Missouri v. Holland* it would apparently be sufficient to show that the subject is one proper for international negotiation. That, of course, would have reference merely to the legality of such exercise of the treaty power, and not at all to its expediency. It will be pointed out subsequently, however, that expediency undoubtedly has much to do with determining what is a fit subject for the treaty power.

The idea of solving the problems of labor by international co-operation is not by any means a new one, but it has gained most of its momentum within the past decade.[107] Prior to 1914, only three international conferences respecting the problems of correcting labor difficulties by treaty were held.[108] The movement was interrupted by the World War, but at the Versailles Conference received its greatest impetus in the form of Article XIII of the Peace Treaty, which, as one writer has said, "must be regarded as one of the most remarkable declarations to be found in any international document."[109] It is significant for the purposes of this paper to note also that "both the form and substance of some of those clauses were greatly influenced by American thought and by American suggestion."[110]

Article XIII declared that it was the object of the League of

[107] For a history of the movement to secure labor treaties and international action in regard to the problems of labor, see Mahaim, Le droit international ouvrier (1913); Bauer, Arbeiterschutz und Völkergemeinschaft (1918); the best account in English is, Ayusawa, International Labor Legislation (1920), chs. 1, 2, 3; Buell, *op. cit.* 152-162; Lowe, The International Protection of Labor (1921), chs. 2, 3.

[108] The Berne Conferences of 1905, 1906, and 1913; Périgord, The International Labor Organization (1926), 70-72. There were, however, many individual treaties between nations concerning labor problems, the first of which was between Italy and France in 1904; for a partial list, see Périgord, *op. cit.* 69, and for a more complete list, Lowe, *op. cit.* 171. The statement of Raynaud, Une première application de la legislation internationale du travail (1907), 34 Journ. du droit int. privé, 948-965, in regard to the Berne Conference, is prophetic: "Quoi qu'il en soit de l'avenir, on peut dire que l'oeuvre de la Conférence de Berne est un signe des temps et marque une étape décisive dans l'évolution économique et sociale. A côté des traites de travail qui se multiplient avec une rapidité chaque jour croissante, grace à une série de concessions et avec une volonté très ferme d'aboutir, les diverses Puissances sont arrivées à des dispositions positives de législatione internationale."

[109] The text of Article XIII of the Versailles Treaty may be found in 13 Am. J. Int. L. (Sup.) 361-376 (1919); Miller, 6 Corn. L. Q. 135 (1921).

[110] Miller, *loc. cit.*; a brief account of the origin of the Labor Clauses, together with an account of the movement in the United States, is found in Périgord, *op. cit.* 72-81: "The Peace Conference cannot be given the entire credit or blame for the creation of the International Organization of Labor. It was almost imposed upon them by a great wave of popular sentiment, and the principles embodied in the Treaty of Peace had long been considered as a necessary minimum by various conventions the world over."

Nations to establish universal peace; that this could not be done unless such a peace were based upon social justice; that social injustices in the condition of labor existed then in such a state as to imperil the peace of the world; and that, as a consequence, there was a great and needed reform in such matters as the regulation of the hours of work, including the establishment of a working day and week, the regulation of the labor supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease, and injury arising out of his employment, the protection of children, young persons, and women, the provisions for old age and injury, the protection of the interests of workers when employed in other countries than their own, the recognition of the principle of freedom of association, the organization of vocational and technical education, and other matters pertaining to the improvement of labor conditions.[111]

The Article not only stated these desirable aims, but established a permanent labor organization for effectually attaining them, which included a permanent international conference annually for the discussion of labor problems and the proposal of treaties and conventions concerning the matters outlined in the Article.[112] Nine annual conferences have met, the first of which was in Washington in 1919, and the history of these conferences leaves no doubt as to the fact that labor problems form a proper and legitimate matter for international negotiation.[113] Labor conventions and treaties concerning such problems as the eight hour day, night work of women and children, workmen's compensation, and other subjects almost as inclusive as the general terms of Article XIII have been proposed and have received a total of two hundred and thirty-four ratifications or promulgations by the nations of Europe.[114]

[111] 13 Am. J. Int. L. (Sup.) 361 (1919).

[112] *Loc. cit.* 361-376.

[113] The latest account of the results of the Labor Clauses is found in Périgord, *op. cit.* ch. 7 and Appendix 4; the book is strongly argumentative, however, and must be read critically: "Whatever be the official attitude of the United States and of reactionary bodies the world over, a fact clearly stands out, namely, that there functions at Geneva an institution which is not a hasty innovation, but which has been in the making for over a hundred years, which enjoys the protection of the League, is endorsed by fifty-six nations, has a budget of over one and a half million dollars a year, and is supported by the entire labor world with the exception of the revolutionary groups," 262-263.

[114] The following are the subjects of the conventions proposed at the various conferences, together with the citations to the ratifications by the different countries: (1) The eight hour day, Washington, 1919: Italy, Belgium, Latvia, Chile, Czechoslovakia, India, Bulgaria, Rumania, Greece, Austria; (2) the

In view of the long line of cases beginning with *Ware v. Hylton* and concluding with *Missouri v. Holland*, then, it would seem ap-

maternity convention, Washington, 1919: Italy, Bulgaria, Greece, Spain, Rumania, Chile, Latvia; (3) prohibition of night work of women, Washington, 1919: Switzerland, Esthonia, Rumania, France, Great Britain, Czechoslovakia, India, South Africa, Italy, Austria, Belgium, Irish Free State, Bulgaria, Greece, Netherlands; (4) night work of young persons, Washington, 1919: Denmark, Esthonia, Italy, Poland, Netherlands, Belgium, Austria, France, Chile, Great Britain, Bulgaria, Switzerland, Rumania, Greece, Irish Free State, Latvia, India; (5) unemployment convention, Washington, 1919: Germany, France, Irish Free State, Esthonia, Japan, Italy, Spain, Poland, South Africa, Austria, Denmark, Finland, India, Sweden, Rumania, Switzerland, Norway, Bulgaria, Great Britain, Greece; (6) employment of children in industry, Washington, 1919: Japan, Chile, Irish Free State, Latvia, Denmark, Esthonia, Poland, Belgium, Italy, Great Britain, Czechoslovakia, India, Switzerland, Bulgaria, Rumania, Greece, Finland, Netherlands; (7) adherences to the Berne Convention of 1906 concerning the use of white phosphorus in the match industry: Belgium, Esthonia, Argentina, China, Australia, India, Sweden, Austria, Poland, Czechoslovakia, Dantzig, Finland, Japan, Rumania, Palestine, Irish Free State; (8) the Berne Convention of 1906 in regard to women working at night: Poland, Austria, Dantzig; (9) finding employment for seamen, Genoa, 1920: Australia, Germany, Greece, Latvia, Bulgaria, Esthonia, Poland, Italy, Belgium, Norway, Sweden, Japan; (10) employment of children at sea, Genoa, 1920; Irish Free State, Greece, Finland, Canada, Lativa, Bulgaria, Esthonia, Poland, Italy, Denmark, Sweden, Japan, Spain, Belgium, Netherlands, Rumania, Great Britain; (11) unemployment indemnity in case of loss of ship, Geona, 1920; Bulgaria, Esthonia, Poland, Italy, Spain, Belgium, Latvia, Greece; (12) medical examination of young persons at sea, Geneva, 1921; Belgium, Sweden, Finland, Great Britain, Canada, India, Poland, Italy, Japan, Spain, Bulgaria, Esthonia; (13) young persons employed as trimmers and stokers, Geneva, 1921: Esthonia, Belgium, Sweden, Finland, Great Britain, Canada, India, Rumania, Poland, Italy, Denmark, Spain, Latvia; (14) agricultural workers associations, Geneva, 1921: Finland, Great Britain, India, Czechoslovakia, Poland, Austria, Irish Free State, Esthonia, Italy, Latvia, Bulgaria, Germany, Belgium, Chile, Sweden; (15) employment of children in agriculture, Geneva, 1921: Czechoslovakia, Poland, Sweden, Austria, Italy, Japan, Bulgaria, Irish Free State, Esthonia, Hungary; (16) workmen's compensation in agriculture, Geneva, 1921: Netherlands, Germany, Chile, Denmark, Great Britain, Poland, Sweden, Irish Free State, Bulgaria; (17) weekly rest in industry, Geneva, 1921: France, Belgium, Chile, Finland, India, Czechoslovakia, Rumania, Esthonia, Poland, Italy, Spain, Latvia, Bulgaria, Greece; (18) the use of white lead in paint, Geneva, 1921: Poland, Czechoslovakia, Sweden, Italy, Austria, Spain, Latvia, Bulgaria, Greece, Esthonia, France, Belgium, Rumania, Chile; (19) workmen's compensation for accidents (equality of treatment), Geneva, 1925: Czechoslovakia, Great Britain, Sweden, Union of South Africa; (20) occupational diseases, Geneva, 1925: Great Britain; (21) workmen's compensation for accidents, Geneva, 1925: Sweden. 14 (1920) Am. J. Int. L. 251, 449; 15 (1921) *id.* 467, 468, 583, 584, 683; 16 (1922) *id.* 97, 98, 100, 470, 471, 472, 474, 659, 661, 662, 666; 17 (1923) *id.* 142, 143, 146, 352, 353, 354, 355, 356, 554, 555, 557, 778, 779, 780, 782; 18 (1924) *id.* 140, 141, 143, 303, 335, 336, 338, 339, 567, 568, 569, 570, 806, 808, 809, 810, 812, 813; 19 *id.* 98, 189, 190, 192, 591, 592, 659, 787, 788, 789; 20 (1925) *id.* 168, 170, 368, 369, 564, 565, 780, 781; 21 (1926) *id.* 158, 159, 324, 325, 554; *Gazetta Ufficiale*, July 13, 1923, 5313; *id.* May 5, 1924, 1672, 1674, 1675; *id.* May 6, 1924, 1693-1694; *Moniteur Belge*, Jan. 6, 1924, 66; *id.* Sept. 23, 1924, 4437; *Eidgenossiche gesetzblatt*, Dec. 20, 1922, 598; London Gazette, July 17, 1923, 4920; I. L. O. B. Jan. 10, 1923, 30, 42; *id.* Mch. 28, 1923, 111; *id.* July 11, 1923, 5; *id.* July 25, 1923, 49; *id.* Dec. 26, 1923, 220; *id.* Mch. 31, 1924, 75; *id.* Sept. 12, 1924, 106; *id.* July 30, 1926, 137.

parent that, whenever the treaty power deems it to the interest of the nation to negotiate treaties with other nations concerning such matters as labor problems, such treaties will constitute a real and valid exercise of the power. For, as Mr. Justice Field pointed out in *Geofroy v. Riggs,* if the treaty power is to be exercised in a valid manner, the treaty must be a subject proper for international negotiation; it must be in harmony with the express limitations of the Constitution; and it must not be subversive of our form of government.[115] It should be pointed out, however, that the position that a treaty is subversive of our form of government because it touches upon the powers of Congress or upon the reserved powers of the states is not tenable.

The subjects proper for international negotiation will no doubt go on expanding to a not inconceivable time when their limit shall be coextensive with the life of the nation, and will include such subjects as were cited by the writer above, marriage and divorce laws being one class of such subjects. As has always been the case heretofore, however, the question as to the ability of the treaty power to enter into such contracts is not one of abstract constitutional theory, but is essentially a practical one: the propriety of the treaty will be determined largely by the question of political expediency, and this, in turn, will be determined by the prevailing preponderance of public demand in favor of such treaties. As one writer has said: "The same facts which will mould public opinion to demand them will also prove that the treaties are legitimate subjects of negotiation."[116] The movement is already under way in this country to secure correction of labor problems by treaty.[117] At the annual meeting of the American Association for Labor Legislation in 1919 it was declared that "these international evils know no frontiers," and was resolved that "in international agreements there be incorporated minimum protective labor guarantees."[118] It is obvious, then, that "if the President and the Senate decide that in justice to the interests of this country, and to the world at large, the United States should enter into such treaties, their deliberate opinion would undoubtedly have great, if not prevailing, influence upon the Court that the subject was proper for negotiation, as against the supporters

[115] *Supra,* note 52.
[116] Chamberlain, 9 Am. Lab. Leg. Rev. 338 (1919).
[117] Périgord, *op. cit.* 72-81.
[118] 9 Am. Lab. Leg. Rev. 329 (1919).

of a narrow doctrine of state rights."[119] It is equally obvious that, with the failure on two occasions of Congress to pass a constitutional child labor law,[120] and with the failure of the proposed amendment to the Constitution concerning the same subject, the advocates of labor are no doubt prepared to make the most of the new avenue of legislation opened up to them by the decision of the Court in *Missouri v.Holland.*

Is such an increase in the legislative powers of Congress, and a correlative expansion in the treaty power, dangerous as a tendency toward centralization? It has been so viewed by those who support the rights of the states. Doctrinaires of this school have suggested that such an expansion of the legislative powers of congress virtually means government under the treaty power, and there is revealed an altogether unwarranted distrust of the power vested in the President and Senate. One often finds in the writings of this school imaginative rodomontades about what the treaty power may accomplish if the reserved powers of the states act as no limitation upon it. The following may perhaps be taken as the most unmitigated example:[121]

"Have we granted the President the power, if two-thirds of the Senate concur, to contract some of our citizens into slavery on foreign soil in order to acquire for the rest of us desirable rights? . . . Or an agreement that all the inhabitants of California shall be transplanted to Formosa, a selected number to be devoured by cannibals, the rest to labor as Japanese slaves, and in their place the State of California to be populated by Japanese citizens with autocratic powers?"

One is inclined to meet such hypothetical arguments by the remark which Mr. Chief Justice Taft in a recent case applied to "superlative vilifications" by saying that the remarks had so extended themselves as to overleap their own superlativeness and become unconsciously humorous.[122] It must be remembered, however, that the political organ of the government has ever been discreet in the kind of treaties it enters into, and that the Senate has so jealously guarded its prerogative of enacting treaties that it has often raised the question of constitutional incompetency. Secretary of State Hay so well recognized the thorough-going scrutiny to which the Senate

[119] *Supra,* note 116.
[120] *Hammer v. Dagenhart,* 247 U. S. 251 (1917); *Bailey v. Drexel Furn. Co.,* 259 U. S. 20 (1921).
[121] C. B. Bird, 24 Case and Com. 291 (1917).
[122] Quoted, 33 Am. Hist. Rev. 83 (1927).

subjected treaties that he remarked in rather grim humor: "A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain —it will never leave the arena alive."[123]

In regard to this distrust of the treaty power, the statement of Bagehot, a student of practical constitutional government, with reference to the almost unlimited and absolute powers of treaty in the British Ministry, is pertinent for our own system: "At present the Government which negotiates a treaty can hardly be said to be accountable to any one. . . . The thing is done and cannot be undone. . . . In abstract theory these defects in our present practice would seem exceedingly great, but in practice they are not so. . . . English statesmen and English parties . . . can rarely be persuaded even by their passions or their interest to do anything contrary to the real interest of England, or anything which would lower England in the eyes of foreign nations; and they would seriously hurt themselves if they did."[124] American statesmen have always been just as unwilling to commit political suicide.[125] As Mr. Justice Wilson said in *Ware v. Hylton,* "A law does nothing more than express the will of a nation; a treaty does the same."[126] That is, treaties, just as formal legislative acts, are irreconcilable with the Austinian conception of law as a rule of conduct handed down by a determinate sovereign superior. The statement of a recent writer with reference to the sanctions of law is in point: "Leaving out of account the inherent power of resistance to change found in every established order of things, it may be stated as a general proposition that a law or system of laws will be enforced so long as the weight of public opinion behind it is greater than that in favor of its overthrow, and not much longer."[127] The treaty power has shown a disposition to rely upon such a sanction; with this in mind, it must be reasserted that the treaty power, to use Locke's phraseology, "must necessarily be left to the prudence and wisdom of those whose hands it is in to be managed for the public good."[128]

[123] 2 Thayer, *Life of John Hay,* 274, 393.
[124] 4 Works (F. Morgan, ed., 1891), 30.
[125] The Senate, as Hayden points out, was even more jealous of states' rights in the period preceding the Civil War than was the Court. 22 Am. Hist. Rev. 585 (1917).
[126] 3 Dall. 247 (1796).
[127] R. F. Roxburgh, *The Sanctions of International Law* (1920), 14 Am. J. Int. L. 27.
[128] 5 Works (1801 ed.), 425.

Those who, from the adoption of the Constitution in 1788 forward, have thus manifested an inherent distrust of the national power, who have given support to a fixed legal doctrinairism of dual government with a clear line of demarcation between the sovereign powers of each, who have opposed by strict construction the continuous and measured advance and mutability, and therefore the endurance, of the Constitution, have set themselves in opposition to what apparently is, wisely or unwisely, dangerously or salutarily, an inevitable fact: the growth of full powers of nationality on the part of the federal government. Such a tendency, growing partially out of the great increase in international relations, made it also inevitable that the treaty power should finally achieve its political maturity.